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No. 263

IN THE

Supreme Court of the United States

October Term, 1947.

A. H. DOSSETT, D/B/A J. A. DOSSETT LUMBER COMPANY

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JAMES G. WHEELER,
WHEELER, MARSHALL & SHELBOURNE,
Attorneys for the Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

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PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, A. H. Dossett, d/b/a J. A. Dossett Lumber Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above case.

The opinion below has not yet been published, but is found on page 70 of the record.

This petition presents a question as to the meaning and scope of the immunity provisions of Section 202(g) of the Emergency Price Control Act (50 U. S. C. A. Section 922 (g)) and the Compulsory Testimony Act

(49 U. S. C. A. Section 46) as applied to records such as are usually kept and in this instance were by O. P. A. regulations required to be kept by an individual engaged in business as a retail lumber dealer.

By an Inspection Requirement (R. 24) the Price Administrator asserted the right to inspect:

> "Any and all books, records, ledgers, invoices, receipts, and other documents relating to the purchase, sale, delivery, or transfer by you of softwood or hardwood lumber during the period from September 1, 1944, to and including September 1, 1946, and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the above described documents . . . and
>
> ". . . Entire inventory and stock of softwood and hardwood lumber now in your possession or under your control."

The petitioner against whom the Administrator had received no complaint of any violation (R. 54) refused to permit the inspection under the advice of his attorneys to the effect that it was necessary for him to refuse in order to enable him later to assert his privilege against self-incrimination in the manner required by the Act. The District Court not only ordered petitioner to exhibit and permit the copying of his records, but found (R. 17) that by entering into and continuing in his business he had waived the constitutional immunities as to his papers and had waived his constitutional rights against compulsory testimony. Petitioner was thus denied the right to invoke for his protection a section of the law enacted for that purpose. The Cir-

cuit Court of Appeals approved this finding (R. 71, 72) and affirmed the District Court.

Section 202 (g) (Title 50, U. S. C. A. Section 922 (g)) is as follows:

> "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C. 1934 edition, Title 49, Sec. 46) shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act, Section 46, Title 49, U. S. C. A., provides that no person shall be excused from producing records before the United States Commerce Commission, but that no person shall be subject to any penalty or forfeiture on account of any matter concerning which he may testify or any evidence which he may produce before said commission.

The decision of the question thus presented involves not only the Price Control Act, but other statutes conferring upon administrative agencies the power to subpoena records, including Securities Exchange Act of 1943, 15 U. S. C. A. 77; National Labor Relations Act, 29 U. S. C. A. 161; Public Utility Holding Company Act, 15 U. S. C. A. 79s; Federal Power Act, 16 U. S. C. A. 25f; Civil Aeronautics Act, 49 U. S. C. A. 644; Fair Labor Standards Act, 29 U. S. C. A. 208. Petitioner respectfully urges that these provisions should be construed so as to give them some meaning and effect. The ruling of the District Court and the Circuit Court of Appeals would make them applicable only to

matters irrelevant to the inquiry concerning which their protection need never be invoked.

The courts below hold that the unambiguous, comprehensive language of the immunity section of the Price Control Act and the Compulsory Testimony Act is subject to a qualification excluding an ordinary business man's records, if the Price Administrator has required such records to be kept, and thus classified them as *quasi*-public. The requirements of the Administrator as to the keeping of records for the inspection of his agency are so broad as to include all of the records necessarily and usually kept by one engaged in the retail lumber business. Any distinction between protected private papers and public records kept for public purposes is obliterated.

There is no reason to believe that Congress intended that the immunity section of this Act should be thus nullified. The Compulsory Testimony Act has heretofore been upheld by this Court because the immunity provided for was commensurate with the protection of the Fifth Amendment. It appears, therefore, that there is presented here an important question of Federal law, which has not been, but should be, settled by this Court.

WHEREFORE, it is respectfully asked that this petition for a Writ of Certiorari be granted to review the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JAMES G. WHEELER,
WHEELER, MARSHALL & SHELBOURNE,
Attorneys for the Petitioner.

No. 263

IN THE

Supreme Court of the United States

October Term, 1947.

A. H. DOSSETT, d/b/a J. A. DOSSETT LUMBER COMPANY

vs.

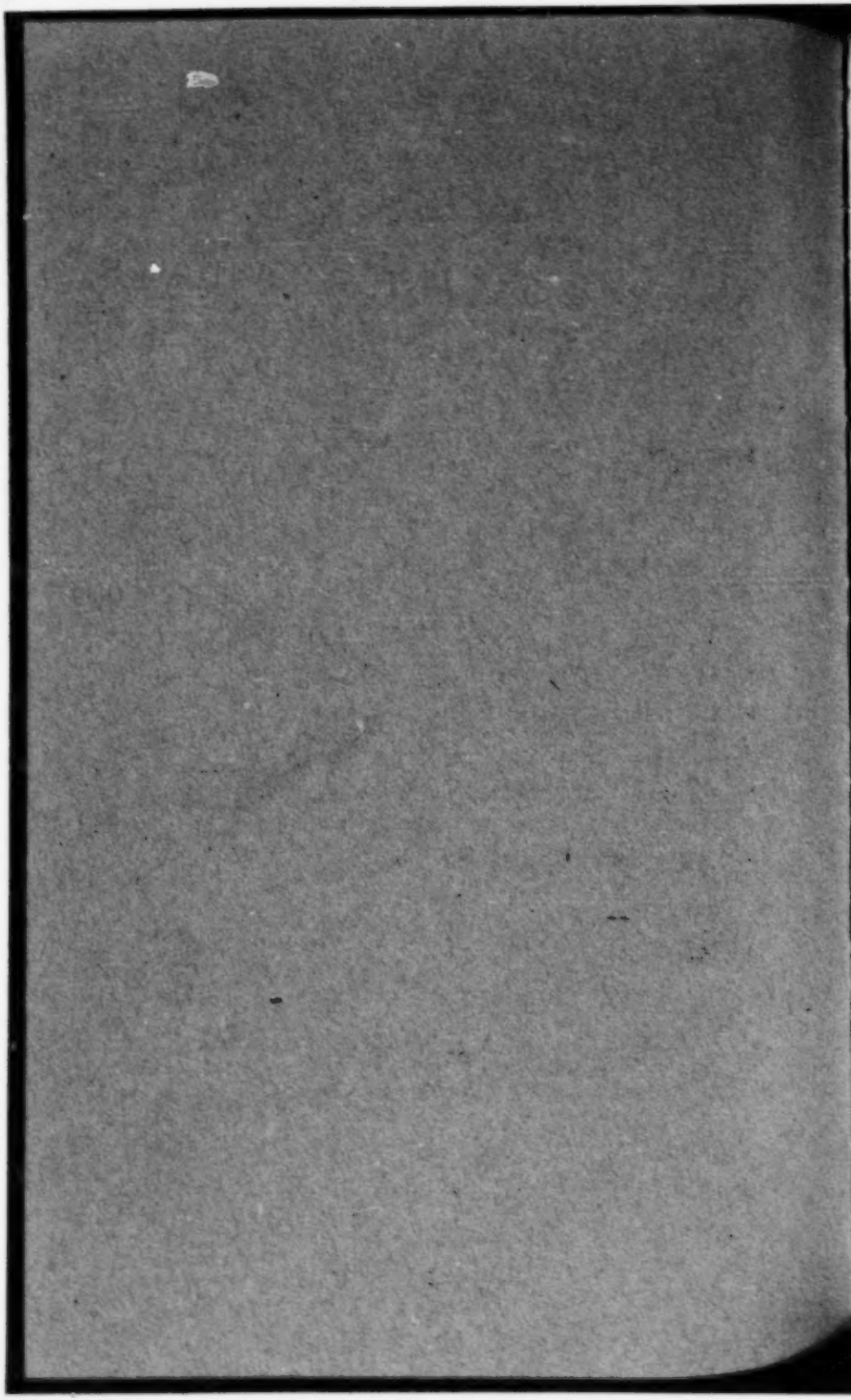
PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

On Petition for Writ of Certiorari from the Supreme Court to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR J. A. DOSSETT, d/b/a J. A. DOSSETT LUMBER COMPANY.

JAMES G. WHEELER,
WHEELER, MARSHALL & SHELBOURNE,
Attorneys for the Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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IN THE

Supreme Court of the United States

October Term, 1947.

A. H. DOSSETT, D/B/A J. A. DOSSETT LUMBER COMPANY

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Court below has not yet been reported. It may be found on page 70 of the record. The judgment was filed May 26, 1947 (R. 69).

JURISDICTION.

This is an application for review of the judgment of the United States Circuit Court of Appeals of the Sixth Circuit directing compliance with an Inspection Requirement issued by the Administrator of the Office of Price Control pursuant to Section 202(b) of the

Emergency Price Control Act (50 U. S. C. A. Section 901 *et seq.*) and denying to the petitioner the protection of the immunity provisions of Section 202 (g) of the above Act (50 U. S. C. A, Section 922 (g)) and of the Compulsory Testimony Act (49 U. S. C. A. 46). It is made pursuant to Title 28 U. S. C. A. Section 347.

STATEMENT.

The action in the District Court was based upon a document called an Inspection Requirement, which appears on pages 24 and 25 of the record and which was in part as follows:

> "You Are Hereby Forthwith Required to Permit
> C. W. Mauzy and J. B. Wilhite
>
> representatives of the Office of Price Administration to inspect at your place of business the following documents:
>
> 'any and all books, records, ledgers, invoices, receipts, and other documents relating to the purchase, sale, delivery, or transfer by you of softwood or hardwood lumber during the period from September 1, 1944, to and including September 1, 1946, and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the above described documents (and to permit the aforesaid representatives of the Office of Price Administration to copy all or any part of the said documents),' and
>
> You are Further Required To Permit the aforesaid representative to inspect the following: En-

tire inventory and stock of softwood and hardwood lumber now in your possession or under your control."

When the appellant sought the advice of counsel as to the proposed examination of his records and stock of lumber his attention was directed to the provisions of the Immunity Section of the Price Control Act (50 U. S. C. A. Section 922 (g)) and he was advised that this section and the Compulsory Testimony Act, which was made a part of it by reference, provided a method whereby he could obtain the protection against Compulsory Testimony provided by the Act; he was further advised that if he voluntarily submitted to the inspection of his business he could not "specifically claim" the immunity. *Bowles* v. *Chu Mang Poo, et al.*, 58 Fed. Sup. 841.

The Administrator then filed a petition in the District Court and this petitioner filed answer alleging affirmatively his desire to secure the benefit of the provisions of the Compulsory Testimony Act and of Section 202 (g) of the Price Control Act; he further alleged affirmatively that the records involved were private records and were not public records required to be kept for public purposes. In ruling on the questions thus presented the District Court said:

> "The conclusion of the Court is that public or *quasi*-public character of the records and papers required to be kept by all persons dealing in such commodities by regulations issued by the Price Administrator under the power granted by Section 902 of the Act, is such as to authorize their inspec-

> tion and copying by the agents of the Administrator and that those who enter into or continue in a business subject to that regulation, waive the constitutional immunities of privacy in respect of their papers and against compulsory testimony."

Some language in the opinion of the Circuit Court of Appeals might be interpreted as holding that the claim of immunity was premature, the Court stating in substance that petitioner could claim his privilege against self-incrimination simultaneously with the production for inspection of the required records. They further stated, however, that they:

> ". . . need not decide whether his claimed privilege in such event would be well grounded, inasmuch as the records herein involved are of a *quasi*-public character." (R. 72)

It appears, therefore, that, regardless of whether petitioner's claim to immunity was premature, it has been completely denied by the courts below.

ARGUMENT.

It was stated by counsel for the Administrator before the District Court that he owed it to the petitioner to say that he had no evidence whatever of any violation by him of the Price Control Act (R. 54). It was not uncommon for persons subject to regulations promulgated by the Office of Price Administration to be uncertain as to whether they had violated them even though they had made every reasonable effort to obey such regulation. Such persons and all persons subject

to the Act are entitled to the benefit of such protection as Congress expressly provided. The provisions for this protection are clear and unambiguous. Congress did not intend that the provisions of Section 202 (g) of the Act should apply only to records and testimony which would have no bearing on matters under consideration. Surely it did not intend that the Price Administrator could by an administrative ruling make all of the records of a business *quasi*-public records and thus obliterate any distinction between private records kept for private purposes and such records as were designed only for the use of an agency of the Government. If Congress had intended to place such a limitation on the immunity provision of the Act, above referred to, it would have done so or it might have omitted the provision entirely, since for practical purposes it would be rendered meaningless.

Our position is that Congress intended to safeguard recognized, existing rights which might be jeopardized in the enforcement of the Act and that the ruling of the courts below does not give meaning to the provision, but amends and modifies it by judicial construction.

From the beginning of this controversy petitioner sought to invoke the provisions of Section 202 (g) of the Emergency Price Control Act and of the Compulsory Testimony Act; that was the purpose of his refusal to yield to the importunities and threats of the agents of O. P. A. His course of action was dictated by his desire to get the benefit of the protection afforded him by this Act. The Administrator, on the other hand, sought to avoid the effect of Section 202 (g).

It appears to us that the application of the so-called "required records rule" in this case is based upon a misconstruction of the doctrine of *Wilson* v. *U. S.*, 221 U. S. 361. In the Wilson case, the Court held that the officer of a corporation could not properly refuse to produce corporate books and records in obedience to a subpoena. The distinction between public records required by governmental order to be kept and private papers was recognized.

The records involved on this appeal are the entire records of a person engaged in business; they are not certain forms or records procured and required to be kept for the inspection of an agency of the Government. They are not records which petitioner would keep only because he was required to do so. Petitioner is an individual, not a corporation. The records sought to be examined must of necessity include private papers, if there are any private papers prepared or used by petitioner in his business.

An early Immunity Statute (Revised Statute, Section 860, Act of February 25, 1868) was found to afford insufficient protection within the meaning of the Fifth Amendment. This Court stating that:

> "In view of the constitutional provision a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates." *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110.

The present Compulsory Testimony Act was upheld because of the completeness of the exemption afforded by it as then construed by the Court (*Brown* v. *Walker*,

161 U. S. 591, 40 L. Ed. 819. The following is quoted from the opinion of Chief Justice White in *Glickstein v. United States,* 222 U. S. 139, 56 L. Ed. 128:

> "1st. It is undoubted that the constitutional guaranty of the 5th Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even although the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation. The authorities which establish this elementary proposition are too numerous to be cited, and we therefore simply refer to a few of the leading cases on the subject . . ."

Referring to the Federal statute under consideration in the case of *In Re: Hoffman,* 68 Fed. Sup. 53, the Court said:

> "These two statutes must be taken together, as the Compulsory Testimony Act of 1893 is expressly incorporated by reference in the Emergency Price Control Act. The two statutes are unambiguous. They exempt from prosecution any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records.
>
> "It is claimed by the Administrator, however, that the statute should not receive this broad construction. Subsection (b) of the same section of the Emergency Price Control Act authorizes the Administrator to require any person who is en-

gaged in the business of dealing in any commodity to make and keep records and other documents and to furnish information. It is admitted that the records involved in this proceeding are records which the Administrator required to be kept under the regulations issued by him pursuant to this statutory authority. The Administrator claims that the immunity provision should not apply in respect of records which are so required to be maintained, but only as to any other records or information. The Administrator bases his contention on the proposition that the privilege of the Fifth Amendment does not apply to records which regulations require to be kept.

"The difficulty is, however, that the statute contains no such exception and no such limitation. It may well be that the statutory immunity is broader than the constitutional immunity. As to that I express no opinion. To read into the statute the qualification which the Administrator would have this Court insert into the Act would practically be to amend an Act of Congress by judicial construction. The Act as it stands is unambiguous and unequivocal as well as comprehensive. An insertion of the restriction would, in effect, be an amendment of the Act."

We respectfully urge that the judgments of the courts below have robbed unambiguous statutes of any meaning and deprived petitioner of protection which Congress intended to afford him.

Respectfully submitted,

JAMES G. WHEELER,
WHEELER, MARSHALL & SHELBOURNE,
Attorneys for the Petitioner.

CITATIONS

760098—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 263

A. H. DOSSETT, d/b/a J. A. DOSSETT LUMBER COMPANY, PETITIONER

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On August 13, 1946, a so-called "Inspection Requirement" was issued by the Director of the Louisville District Office, Office of Price Administration, requiring petitioner to permit certain O. P. A. representatives named therein to inspect all of his books and records relating to purchases, sales, and transfers of lumber during the period from August 14, 1944, to August 13, 1946, as well as petitioner's inventory of lumber (R. 3–4). Petitioner having refused to permit such inspection, Paul A. Porter, then Price Administrator, on August 17, 1946, filed a petition in the District Court for the Western District of Kentucky, pray-

ing that an order issue requiring him to do so (R. 1–3).[1] On October 7, 1946, the District Court ordered petitioner to make the designated records available for inspection "by any duly accredited investigators of the Louisville District Office of the Office of Price Administration at respondent's place of business" (R. 18–19; see also R. 14–18).

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the order of the district court was affirmed (R. 69–73; reported *sub. nom. Dossett* v. *Porter,* 161 F. 2d 839). While the case was pending on appeal, on motion of petitioner, Philip B. Fleming was substituted as appellee in place of Paul A. Porter, Fleming, as Administrator of the Office of Temporary Controls, having previously taken over, *inter alia,* the functions of Price Administrator. See *Fleming* v. *Mohawk Co.,* No. 583, Oct. T. 1946, decided April 28, 1947.

After the entry of the judgment below and prior to the filing of the present petition for certiorari seeking review of that judgment, the functions of the Office of Price Administration were further transferred and distributed in pursuance of the program for their liquidation. By Executive Order No. 9841 of April 23, 1947 (12 Fed. Reg. 2645), which became effective on or about June 1, 1947, the then remaining administrative functions were distributed among the Department of Agriculture, the Department of Com-

[1] No other O. P. A. enforcement proceeding was then or is now pending against petitioner. See R. 54.

merce, and the Office of the Housing Expediter.[2] Under Executive Order No. 9842 of the same date (12 Fed. Reg. 2646), also effective June 1, 1947, the responsibility and authority over O. P. A. litigation were transferred to the Department of Justice.

Upon the effectuation of the foregoing Executive Orders on or about June 1, 1947, the Office of Price Administration, even as part of the Office of Temporary Controls, was entirely abolished, together with its Administrator, personnel, and all field offices. In these circumstances, the question presented by the petition for a writ of certiorari, if not moot, is certainly highly academic, for the Office of Price Administration no longer exists, and there is no Louisville District Office, the accredited representatives of which were the only persons authorized by the order of the district court to effect compliance with its terms.

Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

SEPTEMBER 1947.

[2] By June 1, of course, most of the price control programs had been abandoned, leaving only those with respect to rice and rent.

U. S. GOVERNMENT PRINTING OFFICE: 1947